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IN THE

Supreme Court of the United States

October Term, 1969

ISIDORE ENGELMAN,

Petitioner,

against

WILLIAM CAHN, as District Attorney of the County of Nassau, State of New York, and others,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDORE ENGELMAN,
By JACOB W. FRIEDMAN,
Attorney for Petitioner,
233 Broadway,
New York, N. Y. 10007.

ABRAHAM ENGELMAN,
of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional Provisions	2
Statement of Case	2
Reasons for Allowance of Writ	4
Opinion of United States Court of Appeals for the Second Circuit	9

Cases Cited

Cameron v. Johnson, 390 U. S. 611	6
Holmes v. New York City Housing Authority, 398 F. 2d 262	6
Jones v. Mayer Co., 392 U. S. 413	7
Kaiser v. New York, 394 U. S. 280	5
Sullivan v. Little Hunting Park, 24 L. Ed. 386 (decided December 15, 1969)	7
Zwickler & Koota, 389 U. S. 244	6

Statutes Cited

	PAGE
28 U. S. Code Sec. 1257	2
28 U. S. Code Sec. 1343(3)	2
42 U. S. Code Sec. 1983	2
47 U. S. Code Sec. 605	2, 3
United States Constitution	
Article VI	2
Amendment IV	2
Amendment XIV	2

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Isidore Engelman respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on December 15, 1969, vacating a temporary injunction theretofore granted and directing the dismissal of the complaint.

Opinions Below

In the United States District Court for the Eastern District of New York no opinion was rendered by Travia, D. J., the docket entry being "No opposition—Motion granted. Submit order on notice." The United States Court of Appeals for the Second Circuit rendered an opinion (by Friendly, Circ. J.), a copy of which is hereto annexed.

Jurisdiction

The judgment of the aforesaid Court of Appeals sought to be reviewed herein was rendered on December 15, 1969.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1257. The jurisdiction of the United States Dstrict Court was based on 28 U. S. Code Sec. 1343(3) and 42 U. S. Code Sec. 1983.

Question Presented for Review

Where wiretap evidence has been obtained and divulged in conceded violation of former Sec. 605 of the Federal Communications Act (47 U. S. Code Sec. 605), so that under controlling decisions of this Court it will be inadmissible in a state criminal prosecution not yet brought to trial or in any future administrative proceeding, is the defendant in that prosecution (petitioner herein) entitled to maintain an action in the federal Court to declare such evidence to have been unlawfully obtained and to enjoin the state prosecutor from using or disclosing such evidence for any purpose?

Constitutional Provisions

Petitioner urges that the acts and conduct of respondents are violative of his rights under the Constitution of the United States, specifically, Article VI (supremacy provision), Amendment IV, as implemented by Amendment XIV, and Amendment XIV.

Statement of Case

There is no substantial dispute as to the facts and proceedings in the Courts below.

On January 26, 1968, one DePaola, a detective, swore to an information charging petitioner and another with

violating former Sections 580, subd. 1, and 986 of the Penal Law of the State of New York (conspiracy to engage in bookmaking, and the substantive misdemeanor of bookmaking). The dates of the alleged offenses were between April 21, 1967, and June 12, 1967. The complaint was specifically stated to be based on information and belief, founded on "telephone conversations of the defendants monitored by the complainant pursuant to wire tap order of the County Court, Hon. Albert Oppido, dated April 17th, 1967." A warrant of arrest was issued accordingly: petitioner surrendered on January 30, 1968, on which day he pleaded not guilty.

Petitioner filed suit in the United States District Court on February 29, 1968, alleging that New York Code of Criminal Procedure Sec. 813-a was unconstitutional (as this Court held in *Berger* v. *New York*, 388 U. S. 41), and that the wire tapping done by respondents was illegal. The Court of Appeals below, making no reference to the allegation of illegality, put it (p. 759):

> "Alleging that such wire-tapping violated his rights under the Fourth and Fourteenth Amendments, Engelman sought declaratory and injunctive relief with respect to the use of the wiretapped conversations in the pending criminal prosecution or before any court as well as an order directing all tapes or transcripts of the conversations to be surrendered to him or destroyed."

It was further shown that petitioner is the holder of a license to operate a retail liquor store and that if the respondents transmitted the recordings to the State Liquor Authority, he would probably face revocation of his license and deprivation of his means of livelihood.

After divers interlocutory proceedings petitioner moved in the United States District Court for an injunction. Respondents obtained a three-week adjournment, and when the motion finally came on for hearing on May 28,

1969, no one opposed it or submitted any answering papers. It was thus granted on default before Travia, D. J., the docket entry reciting "No opposition—Motion granted," and an order was entered accordingly on June 11, 1969. Nevertheless, respondents appealed to the United States Court of Appeals, Second Circuit, from that order. The latter Court requested affidavits as to whether there had in fact been any intention to oppose the order. Incidentally, petitioner challenged the right of respondents to take any appeal, as well as the right of respondent William Cahn to represent them, in view of New York County Law, Sec. 501, giving the County Attorney the exclusive right to defend all civil actions brought against county officers for their official acts. The County Attorney, in his official capacity, did not appeal.

The Court of Appeals vacated the temporary injunction and remanded the cause with instructions to dismiss the complaint, on the opinion of Friendly, Circ. J., copy of which is hereto appended.

Reasons for Allowance of Writ

As is suggested above in the question presented for review, petitioner's basic contention is as follows:

Since it is incontrovertible that the wiretaps in the possession of respondents were procured in contravention of petitioner's rights, so as to render them inadmissible in any criminal prosecution or administrative proceeding, petitioner is entitled to have the federal Court so declare and enjoin their use.

That the use of the wiretaps herein is barred has been clearly declared by this Court in the two recent decisions in *Lee* v. *State of Florida*, 392 U. S. 378 (June 17, 1968), and *Fuller* v. *Alaska*, 393 U. S. 80 (October 28, 1968). The first of these cases held that recordings procured by police interception of the accused's telephone conversations in vio-

lation of 47 U. S. Code Sec. 605 (prohibiting unauthorized interception and divulgence) were inadmissible in a state court prosecution for violation of lottery laws, while *Fuller* held that "the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." In view of the foregoing holdings, inasmuch as respondents have not yet brought petitioner to trial and did not utilize the forbidden evidence before June 17, 1968, they are forever precluded from making any use of it. Nevertheless, since they have evidenced an intent to the contrary, petitioner properly sought a declaratory judgment and an injunction in support of his indubitable rights.

The Court of Appeals herein referred to the two authorities cited and, indeed, recognized (pp. 760-761) that this Court decided in *Kaiser* v. *New York*, 394 U. S. 280, that "neither *Lee* nor *Katz* (389 U. S. 347) required overturning a conviction resting on wiretap evidence obtained pursuant to an order under Sec. 813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz* and the wiretap evidence was introduced prior to the date of *Lee*."

In spite of the recognition by the Court of Appeals of the merit in petitioner's posture, it concluded in substance that the doctrine of abstention barred him from invoking the Federal courts for relief. Citing a number of peripheral and inapplicable cases, the Court declined to intervene to "bring a state prosecution to a halt,"—in effect brushing aside the circumstances that petitioner merely asks for a declaratory judgment and an injunction only against the use of proscribed evidence either in the bookmaking case or in administrative channels. Where the challenged evidence was obtained under a New York procedural statute declared unconstitutional by this Court and in violation of a federal statute, his recourse to the federal Court was perfectly legal.

Actually the point is concluded by this Court's decision in *Zwickler* v. *Koota,* 389 U. S. 244, where Mr. Justice Brennan wrote:

> "It is better practice, in a case raising a federal constitutional *or statutory* claim, to retain jurisdiction rather than to dismiss" (italics supplied).

Instead of explaining why that case does not control herein, the Court below merely mentioned it in a footnote (p. 765), suggesting that it applied only in a situation where "the state courts will narrowly construe a statute and thus render it impervious to constitutional attack." We fail to perceive how that attempted differentiation has the slightest applicability herein.

Soon thereafter, in *Cameron* v. *Johnson,* 390 U. S. 611, Mr. Justice Brennan wrote for this Court:

> "In *Zwickler* we held that it was error in the absence of special circumstances to abstain and refuse to render a declaratory judgment."

The underlying rationale of *Zwickler* is that abstention "'would impose expense and long delay upon litigants . . .'" (p. 251). While agreeing that the evidence is inadmissible, the Court below nevertheless would require petitioner to defend his person and livelihood before other courts as well as administrative tribunals.

The decision of the Court of Appeals herein seems to be at variance with its own holding in *Holmes* v. *New York City Housing Authority,* 398 F. 2d 262, where it held (by Anderson, Cir. J.)

> "At least in actions under the Civil Rights Act the power of a federal court to abstain from hearing and deciding the merits of claims properly brought before it is a clearly restricted one which may be

> invoked only in a narrowly limited set of 'special circumstances.' Zwickler v. Koota, 389 U. S. 241; cf. Allegheny County v. Frank Mashuda Co., 360 U. S. 185. In enacting the predecessor of Section 1983 Congress early established the federal courts as the primary forum for the vindication of federal rights, and imposed a duty upon them to give 'due respect' to a suitor's choice of forum . . . Where a district judge chooses to exercise his equitable discretion in favor of retaining such an action it will be unusual indeed when an appellate court refuses to uphold his decision."

In view of that recent prior holding of the same Court, it would appear that the decision sought to be reviewed herein creates an irreconcilable inconsistency in the law of the Second Circuit, wholly apart from its untenability in the light of the Supreme Court's applicable declarations. Further appellate review seems highly desirable for a final reclarification of the law on the subject.

It may also be noted that the Court below made passing reference to the amendments to 47 United States Code Sec. 605, enacted on June 19, 1968. Disregarding the fact that subsequently this Court decided *Fuller* (October 28, 1968, and *Kaiser* [1969] which re-affirmed both *Fuller and Lee*), the Court below observed that "In light of the disposition we make of this case we express no views concerning their effect on antecedent wiretaps except to say that this is not free from doubt" (footnote, p. 759).

Finally, in the very recent case of *Sullivan* v. *Little Hunting Park*, 24 L. Ed. 386 (decided December 15, 1969), this Court reiterated the rule of *Jones* v. *Mayer Co.*, 392 U. S. 413, that even where the federal law provides no explicit method of enforcement, a federal court has power to fashion an effective federal remedy. The three dis-

senting Justices indicated that "The issues of what remedies a state court must or must not provide in cases involving federal rights is a most difficult and confusing area of the law."

In any event it is manifest that the present application presents meritorious and at least arguable questions on a subject likely to arise in connection with other cases and of a character calling for authoritative disposition.

The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., January 27, 1970.

ISIDORE ENGELMAN,
By JACOB W. FRIEDMAN,
Attorney for Petitioner.

ABRAHAM ENGELMAN,
of Counsel.

Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge*:

This action, in which federal jurisdiction was asserted under the jurisdictional implementation, 28 U.S.C. §1343 (3), of the Civil Rights Act, 42 U.S.C. §1983, was brought in the District Court for the Eastern District of New York in February 1968. The complaint alleged that on January 26, 1968, Detective DePaola, one of the defendants here, filed a two count information and complaint in the District Court of Nassau County, New York, charging Engelman and another with conspiring to violate and with substantively violating former §986 of the New York Penal Law relating to bookmaking. The state court complaint averred that the source of the detective's knowledge and the basis of his belief were "telephone conversations of the defendants monitored by the complainant pursuant to wire tap order of the County Court, Hon. Albert Oppido, dated April 17, 1967, wherein the complainant heard the defendants commit the aforesaid acts." Alleging that such wiretapping violated his rights under the Fourth and Fourteenth Amendments, Engelman sought declaratory and injunctive relief with respect to the use of the wiretapped conversations in the pending criminal prosecution or before any other court as well as an order directing all tapes or transcripts of the conversations to be surrendered to him or destroyed.

A flurry of papers followed. Plaintiff moved for a temporary injunction; he said something about convening a three-judge court to enjoin the enforcement of §813-a as unconstitutional but apparently the motion was not pressed. The defendants cross-moved to dismiss the complaint. After several adjournments both motions were argued before Judge Weinstein on June 26, 1968. By that

time the Supreme Court had decided *Lee* v. *Florida*, 392 U.S. 378 (1968), overruling *Schwartz* v. *Texas*, 344 U.S. 199 (1952), and holding that wiretap evidence obtained and divulged in violation of former §605 of the Federal Communications Act, 47 U.S.C. §605 (1964 ed.), is inadmissible in state criminal prosecutions. Since then the plantiff, who had earlier disavowed any reliance on §605, appears to have considered it to be the heart of his case, while the defendants, who had earlier spent considerable time arguing the inapplicability of the section, have emphasized that it was not mentioned in the complaint and that the complaint has never been amended to refer to it.[1] Something seems to have been said about Engelman's holding some kind of license from the State Liquor Authority and the effect thereon of the wiretap evidence of gambling, see N. Y. Alcoholic Beverage Control Law, §118, and everyone appears to have considered this as part of the case although no one bothered to amend the complaint to state it. Noting an indication by the District Attorney "that he has no intention to use the wiretap evidence" in the criminal prosecution and a representation that the evidence would not be furnished to the Liquor Authority pending the decision in *Kaiser* v. *New York, cert. granted*, 390 U.S. 1023 (1968), which the judge thought would probably determine the retroactive effect of *Lee*, the court denied both motions without prejudice to their renewal.

The Supreme Court found occasion to speak to the retroactivity of *Lee* even before it decided *Kaiser*. Addressing itself to a pre-*Lee* trial, it said in *Fuller* v. *Alaska*, 393 U.S. 80 (1968), that "the exclusionary rule is to be

[1] The papers below made no reference to the drastic changes in the federal wiretap law affected by the Omnibus Crime Control and Safe Streets Act, 82 Stat. 212, enacted on June 19, 1968. In light of the disposition we make of this case we express no views concerning their effect on antecedent wiretaps except to say that this is not free from doubt.

applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*" On March 24, 1969, in *Desist* v. *United States,* 394 U.S. 244, the Court announced that *Katz* v. *United States,* 394 U.S. 244 (1969), 389 U.S. 347 (1967), which overruled the doctrine that only trespassory eavesdrops or intrusions into constitutionally protected areas could rise to the level of unconstitutional searches and seizures, would be given "wholly prospective application," 394 U.S. at 246, to wit, "only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." 394 U.S. at 254. The same day the Court decided *Kaiser* v. *New York,* 394 U.S. 280 (1969), and held that neither *Lee* nor *Katz* required overturning a conviction resting on wiretap evidence obtained pursuant to an order under §813-a where the wiretap was nontrespassory (as apparently was the case here) and occurred prior to the date of *Katz* and the wiretap evidence was introduced prior to the date of *Lee.*

Meanwhile Engelman had renewed a motion to suppress in the state court, which had previously been denied. Although the new motion was made before *Fuller, Kaiser* and *Desist,* argument was postponed until after these cases were decided, and the court then reserved decision.[2] A fortnight later plaintiff renewed his motion for a temporary injunction in the federal suit, contending among other things that the danger of prejudice before the Liquor Authority required the injunction regardless of what the state criminal court might decide on the motion to suppress on the bookmaking charge. After the defendants had obtained a three week adjournment, the motion came on before Judge Travia on May 28, 1969. The docket entry recites "No opposition—Motion granted. Submit order on

[2] Although the state judge ultimately denied the motion to suppress without prejudice to its renewal, this was because he thought the federal injunction subsequently entered had rendered the issue academic.

notice." On June 11 the court entered an order enjoining defendants *pendente lite* from offering any wiretapped conversations monitored or recorded pursuant to the order under §813-a "as evidence or proof, or for any other purpose in any action or proceeding before any court, person, or any administrative agency, or in any manner whatever."

Defendants promptly appealed to this court. On August 6, 1969, they obtained an order granting a preference and dispensing with briefs on appeal but directing that an appendix be filed within 20 days. Their sense of urgency then declined. The appendix was not filed until September 29, and the appeal was not brought on for argument until November 7. Meanwhile—and since—we have been subject to a deluge of affidavits and memoranda from the district attorney. The experience demonstrates the undesirability of granting dispensation from the simple provisions of the Federal Rules of Appellate Procedure save on the strongest showing of need.

The first question encountered is whether the injunction was in fact granted in the absence of opposition. Being unable to resolve this on the record, we requested the parties to furnish affidavits as to what occurred in the district court on May 28. While no one appeared there for the District Attorney, a Deputy County Attorney who was in court on another matter made known that the deputy in charge was engaged elsewhere. According to his affidavit, he requested an adjournment but was told by the judge there was no point in this in view of the *Lee*, *Fuller* and *Kaiser* decisions. The deputy says he stated he could not consent to the granting of the motion but had no papers to present. In light of this, and of the defendants' consistent history of opposing everything, we cannot think the motion was consented to except in the narrow sense that no one was on hand to speak against it that day. We therefore proceed to the merits.

The portion of the injunction relating to the use of evidence obtained by wiretapping in the state criminal proceeding would seem to fly in the face of *Stefanelli* v. *Minard,* 342 U.S. 117 (1951), which was followed in *Pugach* v. *Dollinger,* 365 U.S. 458 (1961), unless that decision is inapplicable when admission of the evidence would require reversal and unless such was the case here. The argument for such a view would be that *Stefanelli* and *Pugach* were designed simply to protect the doctrines of *Wolf* v. *Colorado,* 338 U.S. 25 (1948), and *Schwartz* v. *Texas,* 344 U.S. 199 (1952), from backdoor attacks, but that the situation differs now that *Wolf* and *Schwartz* have been overruled.

We do not read *Stefanelli* as thus limited. See *Cleary* v. *Bolger,* 371 U.S. 392 (1963). Indeed it was the very inability of the petitioners in that case to protect their interests in the ordinary course of defense at trial and subsequent appeal that gave their position such limited plausibility as it had. See 342 U.S. at 119-20. The holding was "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U.S. at 120. Mr. Justice Frankfurter spoke eloquently of "perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." *Id.* He mentioned that "the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment," *id.,* citing the anti-injunction statute, 28 U.S.C. §2283. The Court also noted that to sanction any such intervention as was proposed "would invite a flanking movement against the system of State courts by resort to the federal forum . . . , which conscientious counsel might be bound to em-

ploy, to subvert the orderly, effective prosecution of local crime in local courts," 342 U.S. at 123-24.

We are well aware of decisions, as far back as *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), and *Bacon* v. *Rutland R.R.*, 232 U.S. 134 (1914), holding that although exhaustion of state administrative remedies is normally required, exhaustion of state judicial remedies is not. Even apart from the effect of 28 U.S.C. §2283, statements of the latter sort still leave intact, as we noted in *Potwora* v. *Dillon*, 386 F.2d 74, 77 (2 Cir. 1967), the historic rule, embodied in §16 of the First Judiciary Act, 1 Stat. 82 (1789), and later in Rev. Stat. §723 and 28 U.S.C. §384 (1940 ed.), that suits in equity shall not be sustained in courts of the United States "in any case where a plain, adequate and complete remedy may be had at law." The Supreme Court has affirmed the general applicability of this principle when the remedy at law is a motion to suppress or an objection in a state criminal prosecution both in *Cleary* v. *Bolger, supra,* 371 U.S. at 400-01, and in *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-85 (1965). Indeed the Court there stated:

> "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment," 380 U.S. at 485, n. 3 (1965).

We see no reason to think this is such a case.

We find no sufficient basis for reaching a different conclusion concerning the propriety of the portion of the order which enjoined the defendants from communicating evidence obtained by the wiretaps to the State Liquor Authority. The New York Court of Appeals has recently held the exclusionary rules to be fully applicable in proceedings before that agency, *Finn's Liquor Shop* v. *State Liquor Authority,* 24 N.Y.2d 647, 301 N.Y.S.2d 584 (1969), and

there is thus no ground for belief that any testimony resulting from wiretaps subsequent to December 18, 1967, or inadmissible as a consequence of a federal statute, will be there received. It is true that the anti-injunction statute, 28 U.S.C. §2283, is inapplicable since it relates only to *pending* state *court* proceedings. But, as we have pointed out, although *Stefanelli* relied in part on 28 U.S.C. §2283, it rested on larger principles of equity and federalism, which the Court has again recognized in the passages we have cited from *Dombrowski*. We also note that the injunction which the Supreme Court directed to be reversed in *Cleary* v. *Bolger, supra,* 371 U.S. at 395, included the use of evidence at an administrative proceeding before the Waterfront Commission.

Defendants have requested that we not merely reverse the temporary injunction but also direct dismissal of the complaint. Since our review has disclosed the lack of equity in the bill, that is the appropriate course.[3] See *Metropolitan Water Co.* v. *Kaw Valley Drainage District,* 223 U.S. 519, 523 (1912); *Triumph Hosiery Mills, Inc.* v. *Triumph Int'l Corp.,* 308 F.2d 196, 200 (2 Cir. 1962); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 952 (1969).

The temporary injunction is vacated and the cause remanded with instructions to dismiss the complaint. In view of appellants' disregard of the terms of the order with respect to their expedited appeal, we deny costs.

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[3] That plaintiff sought declaratory as well as injunctive relief is no bar to this result. *Zwickler* v. *Koota,* 389 U.S. 241 (1967), where the Supreme Court distinguished between the two types of relief for purposes of the abstention doctrine, is not in point. This is not a case in which the federal court is asked to withhold relief in the hope that the state courts will narrowly construe a statute and thus render it impervious to constitutional attack. Rather, the denial of federal relief rests on the desire to avoid unnecessary friction between state and federal courts and piecemeal litigation of criminal cases. Declaratory judgments can be as dangerous as injunctions in that respect.